(22,908)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 115.

JOSEPH A. TANEY, TRUSTEE OF THE ESTATE OF THE MILLER PURE RYE DISTILLING COMPANY, APPELLANT,

vs.

PENN NATIONAL BANK OF READING.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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a TRANSCRIPT OF RECORD.

No. 1355.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Petitioner-Appellant,
v.
PENN NATIONAL BANK OF READING, Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Filed February 12, 1910.

1 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy.

No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Certificate by Referee to the Judges.

I, Alfred Driver, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said case before me the following question arose pertinent to the said proceedings:

The petition in Bankruptcy was filed on February 3rd, 1908. The sale of the collateral held by the Penn National Bank, hereinafter referred to, was made on February 5th, 1908. The Court appointed a Receiver in Bankruptcy on February 7th, 1908. The adjudication of Bankruptcy was made February 19th, 1908, and the Trustee was appointed on March 24th, 1908.

The Penn National Bank of Reading, Pa., loaned to said Miller Pure Rye Distilling Company the sum of $2,500.00 for which the Miller Pure Rye Distilling Company made its note to the Bank, dated August 26th, 1907, payable four months after date, and it is stated in said note that there was deposited with the Bank as collateral security "the following property, to wit, 200 barrels of whiskey in the bonded warehouse of the Distilling Company at Womelsdorf, Pa., as per warehouse receipts, gaugers certificate, etc., accompanying."

2 There was no actual delivery of the whiskey or of any part of it. The note was not paid and the Bank alleges that on February 5th, 1908, it exposed to public sale "the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note" and became the purchaser of said warehouse certificates and "by virtue of said sale became the absolute owner and holder of said warehouse certificates and the 200 barrels of whiskey embraced therein."

The question presented is whether upon the facts stated in the opinion of the Referee and under the law the issuing of said certificates by the Miller Pure Rye Distilling Company to the Bank for said whiskey, which whiskey remained in the possession of the Miller Pure Rye Distilling Company, and it was not in any way indicated that the whiskey was pledged to the Bank, can be held to be a valid transfer to the Bank of the whiskey as a pledge, and whether the Bank is entitled to the delivery of said whiskey to it as its property as against the Trustee and creditors of the Bankrupt, the said whiskey never having been removed from the bonded warehouse of the Miller Pure Rye Distilling Company.

And the said question is certified to the Honorable the Judges for opinion thereon.

The Referee returns and files herewith:

1. Opinion and Order of the Referee.
2. Petition for review.
3. Petition of the Penn National Bank for order to deliver whiskey.
4. Answer of the Trustee to the petition for order to deliver whiskey.
5. Evidence taken before the Referee.

Dated at Philadelphia, Pa., this 24th, day of December, 1908.

ALFRED DRIVER,
Referee in Bankruptcy.

3 *Opinion and Order of Referee.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy.

No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

The Penn National Bank of Reading, Pennsylvania, has filed a petition alleging that it is

"the absolute owner and holder for value of 200 barrels of whiskey and warehouse certificates of said Miller Pure Rye Distilling Company, bearing date and issued August 26th, 1907, for said 200 barrels of whiskey stored in Warehouse No. 2 of said Company."

The petitioner further alleges that it acquired the absolute ownership and title of and to said 200 barrels of whiskey in the following manner. On August 27th, 1907, the petitioner discounted for said Distilling Company a promissory note, dated August 27th, 1907, made by said Distilling Company to the order of the petitioner for $2,500.00, payable four months after date, the said Distilling Company having at the same time deposited with said Bank as collateral security for the payment of said indebtedness warehouse receipts and gaugers certificates for 200 barrels of whiskey in the Bonded Warehouse of said Distilling Company at Womelsdorf, Pennsylvania.

Upon non-payment of said note the said Bank, the petitioner, alleges that it exposed to public sale, on February 5th, 1908,
4 in the City of Reading the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note, having previously advertised said sale for several days and having given written notice by mail, on February 1st, 1909, of the time and place and purpose of said sale to said Distilling Company, and to the Attorney for the Assignee for the benefit of creditors of said Distilling Company

"and sold the same for $200.00, your petitioner having become the purchaser of said Warehouse Certificates at said price, it being the highest and best bidder and that being the highest and best price bid for the same, and your petitioner, the said Bank, by virtue of said sale became the absolute owner and holder of said Warehouse Certificates and the 200 barrels of whiskey embraced therein."

The prayer of the petition is as follows:

"Your petitioner is desirous of being put into possession of the barrels of whiskey embraced in said Certificates and of withdrawing the same from said Warehouse and is ready to surrender the certificate, pay the taxes and other charges and storage required, and therefore prays that an order may be issued forthwith directed to the Trustee in Bankruptcy and that said Trustee be authorized, empowered and directed to execute such notice or notices, etc., as to spirits to be regauged and withdrawn from said Warehouse, and requests as required by the United States Internal Revenue Laws, and to deliver the same to your petitioner or those claiming under it, as required by it or them, upon payment of the charges and storage as required by the terms of said Certificates, and that said Trustee be restrained from interfering with the removal of said whiskey from said Storage Warehouse and premises by your petitioner, or those claiming under it."

5 Three so called certificates were issued by said Miller Pure Rye Distilling Company, all in the same form, one for 25 barrels of whiskey, one for 55 barrels of whiskey and one for 120 barrels of whiskey.

The following is a copy of one of said Certificates:

No. 5454. First District of Pennsylvania. United States Internal Revenue Distillery. Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from ourselves twenty-five (25) Barrels of Miller Pure Rye Whiskey distilled, marked and numbered as per Record Attached, Subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this Certificate, Payment of tax and other charges due thereon and storage at the rate of five cents per barrel per month from August 26th, 1907. Stored in Warehouse No. 2. Inspection Spring 1907. Serial Nos. of Packages 7964/7988.

MILLER PURE RYE DISTILLING COMPANY,
S. V. NAGLE, *President.*

Endorsed: Miller Pure Rye Distilling Co., S. V. Nagle, President. Valid only when signed by the President or Vice-President of the Company. Address all communications to Miller Pure Rye Distilling Co., Philadelphia, Pa. Special Notice. Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

A copy of said note is as follows:

6 $2,500.—

READING, PA., *August 27th*, 1907.

Four months after date I promise to pay to the order of the Penn National Bank of Reading Pa. at The Penn National Bank of Reading, in Reading, Pa. Twenty-five hundred no/100 Dollars without defalcation, for value received; having deposited with the said Bank, as collateral security, for the payment of this and any other past or future indebtedness, liability or liabilities of the undersigned to said The Penn National Bank of Reading, or the holders ther-of, due or to become due or that may hereafter be contracted, the following property, to wit: 220 bbls. whiskey in bonded Warehouse at Womelsdorf Pa., as per Warehouse Rects. gaugers' ctf. &c. accompanying the present market value of which is $— and do hereby agree to deposit forthwith with the holder of this or any other liability or liabilities of the undersigned such additional security as they may from time to time request; and, in default thereof, such liability shall at once become due and payable, as though it had actually matured; and upon default of payment at maturity, whether such maturity be according to the terms of the instrument or shall occur by default in depositing additional security as above agreed, do hereby authorize and empower the holders thereof, for the purpose of liquidation of any liability of the undersigned and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such property, or any additions thereto, or substitutions therefor, without any previous demand, advertisement or notice either at Broker's board or public or private sale, at any time or times hereafter; with the right on the part of such holders to become the purchasers and absolute owners thereof, free of all trusts and claims.

And it is further agreed that the said property, together with
7 any previously deposited or that may be deposited or pledged hereafter, shall stand as one general continuing collateral security for any and all obligations of the undersigned, so that the deficiency on any one shall be made good from the collaterals for the others; the undersigned hereby remain responsible for any deficiency in payment, and hereby waiving all benefit or any stay of execution for any exemption of property from execution or any privilege under any law now or hereafter to be enforced.

Due —— —, ——.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *Pres't.*

The trustee answered said petition and denied that said Bank is the absolute owner of said 200 barrels of whiskey and admits that warehouse receipts were issued therefor to said Bank as collateral security for certain promissory notes named in the petition, and further avers,

"that there has been no delivery of said whiskey, or any part thereof, in any manner whatsoever, and that the said whiskey was under the exclusive control and direction of the Miller Pure Rye Distilling Company at the time of the execution of the Warehouse Receipts."

The said Distilling Company made an assignment for benefit of creditors on December 4th, 1907. The petition in Bankruptcy was filed on February 3rd, 1908. The sale of the collateral by the Penn National Bank took place February 5th, 1908. A Receiver in Bankruptcy was appointed February 7th, 1908. The adjudication of Bankruptcy was entered February 19th, 1908. The Trustee was appointed on March 24th, 1908.

The question involved, as against the Trustee is the valid-
8 ity of the pledge, or attempted pledge, of the 200 barrels of whiskey stored in the Warehouse of the Bankrupt, the Distilling Company.

The Distilling Company made its promissory note and issued certificates in the form above stated, on the strength of which the Bank as collateral loaned the sum of $2,500.00 to the Distilling Company. The certificates were delivered to the Bank, but the whiskey was not delivered to the Bank and remained in the possession and control of the Distilling Company.

There is no evidence to show that the whiskey was set apart by itself in the warehouse. There was no tag or mark of any kind on any of the barrels to indicate that the whiskey had been pledged by the Distilling Company to the Bank. There was absolutely nothing "to negative the apparent ownership of the bankrupt Company in whose possession and under whose control" the whiskey was. Nothing was done by either party at the time the note was made or afterwards to carry the pledge into effect.

The Distilling Company did not deliver the whiskey nor did the Bank mark, remove, or take possession of the 200 barrels of whiskey, or of any of them. The whiskey remained in the warehouse with

other whiskey of the Distilling Company, and was not in any way distinguished or separated from the other whiskey of the Distilling Company, or from that alleged to have been sold by the Distilling Company to other persons and remaining in the warehouse.

There was no notice posted on the inside or the outside of the warehouse, or any part of the premises of the Distilling Company that the 200 barrels of whiskey had been pledged to the Bank. This was the condition existing at the time of the sale. The sale was made at the City of Reading, some miles distant from the warehouse of the Distilling Company in which the whiskey was kept.

9 The Bank alleges in its petition that it exposed to public sale "the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note" and became the purchaser of said warehouse certificates, and "by virtue of said sale became the absolute owner and holder of said warehouse certificates and the 200 barrels of whiskey embraced therein."

In the case of the Millbourne Mills Company, Bankrupt 172 Fed. Rep. 177, certain grain and flour certificates were issued by the Mills Company as a collateral to loans. Each of the flour certificates stated that the Mills Company

"has stored in its warehouse, basement floor, Section A * * * 200 barrels of flour branded U, * * * which will be subject to its order and only deliverable upon the endorsement and surrender of this certificate."

The flour was stored in barrels in the basement of the Company's warehouse under the charge of the Superintendent, in three sections, divided off from each other by upright posts, and all bearing a common brand.

In the whiskey certificates no mark or brand is mentioned and none was placed on the barrels. It is true that the barrels were numbered with the serial numbers, but this does not amount to notice that these barrels of whiskey had been pledged to the Bank.

In the Millburn Mills case, supra, page 181, the Circuit Court of Appeals for the Third Circuit decided that the flour and grain certificates held by the Fourth Street National Bank could not be sustained as warehouse certificates, however they may bear that form, and says that "a man cannot make a warehouse of himself as to his own goods," and that as there was no delivery of the property there was no valid pledge.

10 Counsel for the Penn National Bank, the petitioner, who is also a Director of the Bank, testified as follows:

"the sale was had, and I purchased the collateral on behalf of the Bank for $200.00, that being the highest and best bid made at the sale. Advertisement of the sale was made in the Reading Daily Eagle. There were a number of people there but mine was the only bid. The value of the whiskey is greater than $200.00, but at the sale I really did not know whether there was one barrel there, or whether there were two hundred barrels there. At that time it was known that different people were claiming the same whiskey, and

when I bid $200.00 for this whiskey I did not know whether it was a loss or not. I paid it myself, and it could only be a loss as far as giving credit to the Bankrupt was concerned."

The above citation from the evidence is sufficient to show that the issuing of the so called certificates for this whiskey, which remained in the possession of the Distilling Company, cannot be regarded as making a valid transfer to the Bank of the whiskey as a pledge.

No notice was given to the Collector of Internal Revenue by the Bank or by the Distilling Company of the attempted pledge of said whiskey, and it is not proved that the name of the Bank appears on the books or documents of the Government, or of the Distilling Company, as pledgee of or having any interest whatever in said whiskey.

The sale was held on February 5th, 1908, and the Bank did not notify the Collector of the sale and did not demand delivery of the whiskey, or take any action to obtain possession of it, as its property purchased at said sale, or assert its ownership, until it filed its petition on April 23rd, 1908, one month after the appointment of the Trustee.

Speaking of the rights of the holder of the flour certificates in the Millbourne Mills case, the Circuit Court of Appeals says, page 182:

11 "To preserve the rights of such holders, as against creditors, either by way of equitable lien or pledge it had to be openly and clearly indicated that the flour was theirs, without which the mere storing of it by itself in the basement, which in effect was all that was done was of no avail."

It is clear upon the facts stated that there was no actual delivery of the whiskey. The delivery of the certificates alone without indicating that the whiskey had been pledged was not such a delivery as is essential to a valid pledge.

It is also held in the Millbourne Mills case, page- 184, 185, that a transaction intended as a pledge of property but which for want of delivery is ineffectual as a pledge does not create an equitable lien as against a trustee in bankruptcy who represents the general creditors of the pledgor.

It is contended by the Bank that inasmuch as the whiskey was stored in the bonded warehouse of the Distilling Company it was not in the custody of the borrower, and as the whiskey was in the possession of the bailee actual delivery was not required.

It is provided by Section 3274 Rev. Stat. U. S. as follows:

"Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the Collector having control of the warehouse."

In case of U. S. v. 36 barrels of high wines, 7 Blatchford, 460, Section 29 of Act July 13, 1866 (which is similar to Section
12 3274 Rev. Stat. U. S.), was considered by the Court, which Section provided for an inspector for every distillery to take account of the materials used, and to inspect, gauge and prove the spirits distilled, and that he

"shall take charge of the bonded warehouse established for the distillery in conformity to law, and such warehouse shall be in the joint custody of such inspector and the owner thereof, his agent or superintendent."

In that case the Court said:

"Here then for the protection of the Government to guard against an evasion of the tax upon distilled spirits is interposed a Government official as a guardian and joint custodian of the warehouse. * * * The warehouse was a part of the distillery premises in the proprietorship of the Distilling Company and the spirits in question were their property. * * * The Act does not provide that the Government shall have any possession, custody or control of the spirits, but only a custody of the warehouse jointly with the owner. This gives the inspector, through his participation in the custody of the warehouse and by discharge of his duty to keep same locked when — personally present, a means of guarding against illegal removal of spirits but invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, as a consequence of his joint custody of the place where they may happen to be and he has not as a legal proposition a custody of the spirits themselves. In point of law the owner of the spirits and the owner of the warehouse wherein they are stored is in possession of the spirits and I have no hesitation in saying that he could maintain an action to redress any illegal interference with his possession. * * * In my judgment the owner of both warehouse and spirits has possession and custody and control
13 within the meaning of the Act even though for purposes of guardianship over the rights and interests of the Government in the tax due thereon the inspector be deemed to have a joint custody with him. * * * The officer has no legal possession, custody, or control of the spirits under that section. * * * The mere physical control of the spirits resulting from joint custody of the warehouse does not displace the legal possession of the owner of the spirits, himself in the like joint custody of the warehouse."

No effort was made by the Bank or the Distilling Company to separate from other whiskey in the warehouse or to designate in any way the 200 barrels of whiskey as pledged property. It is not shown that the Collector would not have issued a permit for such purpose. No demand was made upon the Collector for such permit. No authority construing Section 3274 Rev. Stat. U. S. has been cited to show that under that Section the owner of the whiskey, or the pledgee, could not obtain permission to enter the warehouse for the purpose of marking the barrels, or otherwise indicating that they were pledged.

It is evident, if the decision in above case is controlling that the Distilling Company was in possession of the whiskey, and that if actual delivery could not be made, it could have done all that was necessary to make a constructive or symbolical delivery.

In the case of the U. S. v. Witten, 143 U. S., 76, decided in 1892, said Section 3274 R. S. being then in force, the syllabus is:

"The stealing of spirits from a distillery warehouse by reason of the omission of the internal revenue officers to provide sufficient locks on the doors affords no defence to an action on the distiller's bond to pay the tax due on the spirits before their removal and within three years from date of entry."

14 The Supreme Court in that case says, in an opinion by Mr. Justice Gray, Page 78:

"Under the requirements of the internal revenue laws the warehouse was provided by the owner of the distillery at his own expense and on his premises and although declared to be a bonded warehouse of the United States and required to be under the direction and control of the Collector of the District and in charge of a Government storekeeper was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller and to enable him to give bond for payment of the tax on the spirits, instead of paying same at once. The Government assumed no responsibility to him for safe keeping. If he was not satisfied with the security of the warehouse he had only to take any measure consistent with the access and supervision of the revenue officers to make it more secure, or else to pay the tax and remove the spirits. The only duty which the revenue officers owed in regard to the security of the warehouse and the safe keeping of the spirits therein was to the Government and not to the defendants, and any negligence of those officers gave defendants no rights against the Government, and afforded them no excuse for not performing the obligation according to its terms."

If the deposit of the whiskey made by the distiller is solely for his benefit and the Government is concerned therein only for the payment of tax it is difficult to understand the argument that as the whiskey is in a warehouse which is in the joint custody of the Government and the distiller, the Government has such possession of it as bailee as to exclude the owner from setting apart in the warehouse certain barrels of it or all of it as property pledged and showing that the distilling company was not the unqualified owner of it.

15 The case of Keil v. Harris, decided in 1886 by the Supreme Court of Pennsylvania, reported in 5 Central Reporter 865, not reported in the State reports, is cited to show that where personal property is in the hands of the bailee a transfer by bill of sale alone is valid as against creditors of the vendor. The facts in that case are not similar to our case. That was a case of sale. The whiskey was manufactured by the order of the purchaser and was paid for in full. In the report it is stated that the documents showed that the name of the purchaser was written in the produce book of the distiller and also that in the certificate delivered to the purchasers it is stated that the whiskey was sold and transferred to the purchasers

and stored subject to their order or their account and at their risk.

It is evident from the above that the whiskey was not only sold and paid for but that it was transferred to the purchasers. This indicates that possession of the whiskey was transferred by the distillers to the purchasers and that the purchasers were not only the owners but had also been put in possession of the whiskey by the transfer of it to them by the distillers.

There is in our case no semblance of an attempt by actual or constructive delivery to put the Bank in unequivocal possession as pledgee.

It is ordered that the petition of the Penn National Bank of Reading, Pennsylvania, for an order upon the Trustee to execute such writings as may be required by law for the delivery of said whiskey and to cause the delivery of said two hundred barrels of whiskey, serial numbers 7964 to 7988 inclusive, and 7654 to 7658 inclusive, and 8279 to 8328 inclusive, and 8159 to 8278 inclusive to said Bank, be dismissed.

Dated at Philadelphia December 16, 1909.

ALFRED DRIVER,
Referee in Bankruptcy.

16 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Petition for Review.

To Alfred Driver, Esquire, Referee in Bankruptcy:

The petition of the Penn National Bank of Reading, Pa., respectfully represents:

That it is a banking corporation incorporated under the laws of the United States of America and doing business at Reading, Pennsylvania.

That in the month of November, 1907, it presented its second amended petition amending petitions theretofore presented, to Alfred Driver, Esq., Referee in Bankruptcy to whom the proceedings upon said bankrupt estate were referred, and filed the same with him, setting forth that your petitioner is the absolute owner and holder for value of 200 barrels of whiskey and warehouse certificates of said Miller Pure Rye Distilling Company bearing date and issued August 26th, 1907, for said 200 barrels of whiskey stored in warehouse No. 2, said certificates being respectively as follows: Certificate No. 5454 for 25 barrels, inspection Spring of 1907, Serial No. of Packages 7964 to 7988 inclusive, Certificate No. 5455 for 55 barrels, inspection Spring 1907, serial numbers of packages 7654 to 7658 inclusive, and 8279 to 8328 inclusive, Certificate No. 5456 for 120 barrels, inspec-

tion Spring of 1907, serial numbers of packages 8159 to 8278 inclusive, all certificates being dated Ryeland, Berks County, Pa.,
17 and said barrels being delivered only upon surrender of said certificates, payment of taxes and other charges due thereon, and storage at the rate of 5c. per barrel per month from August 26th, 1907, and that said petitioner is also the holder of the gauger's return of spirits covered by the certificates above referred to; that your petitioner acquired the absolute ownership and title of and to the said 200 barrels of whiskey and the warehouse certificates above mentioned in the following manner: On August 27th, 1907, your petitioner discounted for said Miller Pure Rye Distilling Company its promissory note in writing dated August 27th, 1907, drawn by the said Miller Pure Rye Distilling Company to the order of said petitioner for $2,500.00 payable four months after said date,—the said Miller Pure Rye Distilling Company having at the same time deposited with the said bank as collateral security for the payment of said indebtedness warehouse receipts and gauger's certificates for 200 barrels of whiskey in the bonded warehouse of said Miller Pure Rye Distilling Company at Womelsdorf, Pa., being the warehouse certificates hereinbefore mentioned, and did provide in said note and authorize and empower said bank, your petitioner upon default in payment of said note at maturity, to sell, transfer and deliver the whole or any part of the property deposited as collateral as aforesaid, without previous demand, advertisement or notice either at broker's board or at public or private sale at any time or times thereafter, with the right on the part of the holder of the said note to become the purchasers and absolute owners thereof, free of all trusts and claims, the said Miller Pure Rye Distilling Company remaining responsible for any deficiency in payment; that upon maturity of said note, the same was presented for payment where said note was made payable by its terms, but was not paid, and was thereupon duly protested and
18 notice of protest duly given. That upon the non-payment of said note, your petitioner, the holder thereof, pursuant to its terms and the authority therein conferred, exposed to public sale the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note on February 5th, 1908, having previously advertised the sale by public advertisement for several days prior thereto in the Reading Eagle and having given written notice of the time and place and purpose of said sale to said Miller Pure Rye Distilling Company and to the attorney for the assignee for the benefit of creditors of said Miller Pure Rye Distilling Company,—said notice being dated and mailed February 1st, 1908, and sold the same for $200.00 your petitioner having become the purchaser of said warehouse certificates at said price, it being the highest and best bidder and that the highest and best price bid for the same, and that your petitioner, the said Bank, by virtue of said sale became the absolute owner and holder of said warehouse certificates and the 200 barrels of whiskey embraced therein; that the warehouse in which the whiskey is stored was and is under the direction and control of Internal Revenue of the First District of Pennsylvania and in charge of a storekeeper assigned thereto by the Internal Revenue Commissioner and is a bonded ware-

house under the Internal Revenue Laws of the United States. The petitioner representing that it wished to be put into the possession of the barrels of whiskey embraced in said certificates and to withdraw the same from said warehouse and was ready to surrender the said certificates, pay the taxes and other charges and storage required, prayed that an order be issued forthwith directed to the Trustee in Bankruptcy of the Miller Pure Rye Distilling Company and that said Trustee be authorized, empowered and directed to execute such notice or notices, etc., as to spirits to be re-gauged and withdrawn from said warehouse, and requests, as required by the United States Internal Revenue Laws, and to deliver the same to your petitioner or those claiming under it, as required by it or them, upon the payment of charges and storage, as required by the terms of said certificates, and that said trustee be restrained from interfering in the removal of said whiskey from said warehouse and premises by the petitioner or those claiming under it.

The Trustee in Bankruptcy filed an answer to said petition denying that the said bank is the absolute owner of said 200 barrels of whiskey, admits that the warehouse receipts were issued therefor to said bank as collateral security for the notes named in the petition, and further averred that there has been no delivery of said whiskey or any part thereof in any manner whatsoever, and that said whiskey was under the exclusive control and direction of the said Miller Pure Rye Distilling Company at the execution of said warehouse receipts.

Afterwards the said matter came on to be heard before Alfred Driver, Esquire, Referee in said estate and testimony was taken thereon before the said referee as well as upon other claims made by sundry other holders of other warehouse certificates for whiskey and an agreement was entered into by contending parties that the testimony taken with respect to the different claims should enure to the benefit of all parties.

And afterwards, to-wit, the 16th day of December, 1909, the said Referee made the following order upon the petition of said Penn National Bank of Reading, Pa., viz:

"It is ordered that the petition of the Penn National Bank of Reading, Pennsylvania, for an order upon the Trustee to execute such writings as may be required by law for the delivery of said two hundred barrels of whiskey, serial numbers 7964 to 7988 inclusive, and 7654 to 7658 inclusive, and 8279 to 8328 inclusive, and 8159 to 8278 inclusive, to said Bank, be dismissed. Dated at Philadelphia, December 16, 1909. Alfred Driver, Referee in Bankruptcy."

That your petitioner claims that the warehouse certificates of the Miller Pure Rye Distilling Company mentioned in the petition of said Bank and held by it, constitute a valid pledge of the whiskey therein specified, and that the said Bank acquired a good and valid title to the same as against the Trustee in Bankruptcy of said Miller Pure Rye Distilling Company and its creditors.

Your petitioner therefore avers that said order of the Referee

dismissing the petition of the Penn National Bank, petitioner, was and is erroneous; that said Referee should have made an order granting the petition of said Bank and holding that the petitioner is entitled to the possession of said whiskey upon payment of the taxes and other charges and storage due thereon.

Your petitioner avers that the ruling and decision of said Referee and the order made thereon are erroneous.

(*a*) in the conclusions of law,

(*b*) in the finding of fact,

in that he finds,

(*c*) that the issuing of the said certificates for said whiskey cannot be regarded as making a valid transfer to the Bank of the whiskey as a pledge;

(*d*) that the delivery of the certificates alone without indicating that the whiskey had been pledged was not such a delivery as is essential to a valid pledge;

21 (*e*) that there is in this case no semblance of an attempt by actual or constructive delivery to put the Bank in unequivocal possession as pledge;

and in that he does not find,

(*f*) that inasmuch as the whiskey was stored in a United States Bonded Warehouse and in possession of the United States, it was not in the custody of the borrower, but in the possession of a bailee, and that actual delivery was not required;

(*g*) that the said whiskey being in the hands of a bailee and transfer of the said 200 barrels of whiskey by certificate endorsed and delivered to the Penn National Bank, petitioner, was good and valid as against the Trustee in Bankruptcy of the Distilling Company and its creditors;

(*h*) that the customary well-established and recognized methods of transferring title to whiskey in bond are by the use of the distiller's certificates similar in form to those held by the petitioner.

That your petitioner desires a review by the Judge of this Court of the order made by said Referee, and files this petition therefor, and it therefore prays that the error complained of and the questions of law and fact raised before the said Referee and decided by him may be certified by the said Referee to the Honorable the District Judges of this Court; that the same may be reviewed as provided by the Bankruptcy Law of 1898 and General Order XXVII, and that said court enter an order or direct the said Referee to make and enter an order holding and deciding that the pledge to the Penn National Bank of Reading, Pa., of the 200 barrels of whiskey covered by said warehouse certificates is a good and valid pledge of the same as against the Trustee in Bank-

22 ruptcy of said Distilling Company and its creditors, and that the said petitioner is the owner of a good and valid title to the same, and granting the said second amended petition of the Penn National Bank of Reading, Pa., and the prayer thereof.

And your petitioner ever prays, etc.

PENN NATIONAL BANK OF READING, PA.,
[SEAL.] By H. J. BRUMBACK, *Pres't.*

Attest:
(S'g'd) CALVIN D. MOSER,
Cashier and Sec.
(S'g'd) SNYDER & ZIEBER,
Attorneys, Reading, Pa.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, County of Berks:

I, Calvin D. Moser, Cashier of the Penn National Bank of Reading, Pa., the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements set forth in the foregoing petition are true according to the best of my knowledge, information and belief.

(Signed) CALVIN D. MOSER, *Cashier.*

Sworn to and subscribed before me this 22nd day of December, 1909.

(S'g'd) J. VICTOR GRIM,
[SEAL.] *Notary Public.*

My commission expires March 5, 1913.

23 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Second Amended Petition of Penn National Bank of Reading, Pa.

To Alfred Driver, Esquire, Referee in Bankruptcy.

The Petition of Penn National Bank of Reading, Pa., amending the petitions heretofore presented and filed in this proceeding, respectfully represents:

That it is a banking corporation incorporated under the laws of the United States of America and doing business at Reading, Pennsylvania.

That the said Miller Pure Rye Distilling Company was adjudicated a bankrupt February 19th, 1908, and on March 24th, 1908, Joseph A. Taney was on motion duly appointed trustee in bankruptcy.

That your petitioner is the absolute owner and holder for value

of 200 barrels of whiskey and Warehouse Certificates of said Miller Pure Rye Distilling Company, bearing date and issued August 26th, 1907, for said 200 barrels of whiskey stored in Warehouse No. 2, of said Company, said Certificates being respectively as follows: Certificate No. 5454 for 25 barrels, dated Ryeland, Berks County, Pa., August 26, 1907, inspection Spring of 1907, Serial Nos. of Packages 7964 to 7968 inclusive; Certificate No. 5455 for 55 barrels, dated Ryeland, Berks County, Pa., August 26th, 1907, Inspection Spring of 1907, Serial Nos. of Packages 7654 to 7658 inclusive and 8279 to 8328 inclusive; Certificate No. 5456 for 120 barrels, dated
24 Ryeland, Berks County, Pa., August 26th, 1907, Inspection Spring of 1907, Serial Nos. Packages 8159 to 8278 inclusive; said barrels being deliverable only upon surrender of the said Certificates, payment of tax and other charges due thereon, and storage at the rate of 5c. per barrel per month from August 26th, 1907. Copies of the said Certificates are hereto attached and marked Exhibits "A," "B," and "C," and the originals are submitted. Your petitioner is also the holder of the Gaugers Return of Spirits covered by the Certificates referred to.

That your petitioner acquired the absolute ownership and title of and to the said 200 barrels of whiskey and the Warehouse Certificates of said Miller Pure Rye Distilling Company above mentioned, in the following manner; on August 27th, 1907, your petitioner discounted for said Miller Pure Rye Distilling Company a promissory note in writing dated August 27th, 1907, drawn by the said Miller Pure Rye Distilling Company to the order of your petitioner, Penn National Bank of Reading, Pa., for $2,500.00, payable four months after said date,—The said Miller Pure Rye Distilling Company having at the same time deposited with said Bank as collateral security for the payment of said indebtedness, Warehouse Receipts and Gaugers' Certificates for 200 barrels of whiskey in the Bonded Warehouse of said Miller Pure Rye Distilling Company at Womelsdorf, Pennsylvania, being the said Warehouse certificates hereinbefore mentioned, and did provide in said note and did authorize and empower the said Bank, your petitioner, upon default in payment of said note at maturity, to sell, transfer and deliver the whole or any part of the property deposited as collateral as aforesaid, without previous demand, advertisement or notice, either at broker's board or at public or private sale, at any time or times there-
25 after, with the right on the part of the holder of the said note to become the purchasers and absolute owners thereof free of all trusts and claims, the said Miller Pure Rye Distilling Company remaining responsible for any deficiency in payment. Upon maturity of the said note the same was duly presented for payment where said note was made payable by its terms, but was not paid, and was thereupon duly protested and notice of protest duly given. A copy of the said note, marked "Exhibit D," is hereto attached and made a part hereof and the original is herewith exhibited. Upon the non-payment of the said note your petitioner, the holder thereof, pursuant to the terms thereof and the authority therein conferred, exposed to public sale at the Security and Realty Salesrooms in the

City of Reading, the Warehouse Certificate for said 200 barrels of whiskey deposited as collateral for said note, being the certificates above set forth, on February 5th, 1908, having previously advertised said sale by public advertisement for several days prior thereto in the Reading Eagle, a newspaper published in the City of Reading aforesaid, and having given written notice of the time and place and purpose of said sale to said Miller Pure Rye Distilling Company at its offices at Womelsdorf and at Philadelphia, Pa., respectively, and to the attorney for the Assignee for the benefit of creditors of said Miller Pure Rye Distilling Company, addressed to his office at Philadelphia, said notices being dated and mailed February 1st, 1908, and sold the same for $200.00, your petitioner having become the purchaser of said Warehouse Certificates at said price, it being the highest and best bidder and that being the highest and best price bid for the same, and your petitioner, the said Bank, by virtue of said sale became the absolute owner and holder of said Warehouse Certificates and the 200 barrels of whiskey embraced therein.

26 That the said warehouse in which said whiskey is stored, as set forth in said certificates, was and is under the direction and control of the Collector of Internal Revenue of the First District of Pennsylvania and in charge of an internal revenue storekeeper assigned thereto by the Internal Revenue Commissioner. That said warehouse is a bonded warehouse under the Internal Revenue Laws of the United States and is in charge of the storekeeper assigned thereto by the Commissioner, and under the Revenue Laws of the United States said warehouse is in the joint custody of the storekeeper and the proprietor thereof. Your petitioner is informed that under the Revenue Laws of the United States, the Trustee in Bankruptcy succeeds to the rights of the bankrupt upon entering a bond with the United States, given in the sum of $35,000, in order to qualify, and that at a meeting of creditors of said bankrupt held before the Referee on March 24th, 1908, the Trustee in Bankruptcy was authorized, empowered and directed to execute and deliver to the United States Government a bond in the sum of $35,000 as required by the Revenue Laws. Your petitioner is further informed that under the Revenue Laws of the United States said whiskey cannot be removed except upon the declaration and request of the said Trustee in Bankruptcy, evidenced by his signature at the foot of the form of notice, etc., as to spirits to be re-gauged and withdrawn from said warehouse and the signing of a desire to withdraw the same of said Trustee in Bankruptcy and request that such spirits be re-gauged, and presentation of the same to the Collector of Internal Revenue for the proper district, and the payment of taxes and other charges thereon and storage as provided by the terms of the certificates.

Your petitioner is desirous of being put into possession of the barrels of whiskey embraced in said certificates and of withdrawing the same from said Warehouse and is ready to surrender the cer-

27 tificate, pay the taxes and other charges and storage required, and therefore prays that an order may be issued forthwith

directed to the Trustee in Bankruptcy, and that said Trustee be authorized, empowered and directed to execute such notice or notices, etc., as to spirits to be regauged and withdrawn from said Warehouse, and requests, as required by the United States Internal Revenue Laws, and to deliver the same to your petitioner, or those claiming under it, was required by it or them, upon payment of the charges and storage as required by the terms of said Certificates, and that said Trustee be restrained from interfering with the removal of said whiskey from said Storage Warehouse and premises by your peti-oner, or those claiming under it.

And it will ever pray, etc.,

PENN NATIONAL BANK OF READING, PA.,
By A. J. BRUMBACH, *President.*

[Seal of Corporation.]

Attest:
CALVIN D. MOSER, *Cashier.*

STATE OF PENNSYLVANIA,
County of Berks, ss.:

Calvin D. Moser, Cashier of Penn National Bank of Reading, Pa., petitioner above, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing Petition are correct and true to the best of his knowledge, information and belief.

CALVIN D. MOSER, *Cashier.*

Sworn to and subscribed before me this 13th day of November, A. D. 1908.

[NOTARIAL SEAL.] J. VICTOR GRIM,
Notary Public.

My commission will expire March 5, 1909.

28 EXHIBIT "A".

No. 5454 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident, Deliverable only upon Surrender of this Certificate, Payment of Tax and other Charges due Thereon, and Storage at the Rate of Five Cents per Barrel per month, from August 26th, 1907.

3—115

Inspection Spring 1907.
Stored in Warehouse No. 2
Serial Nos. of Packages 7964/7988

MILLER PURE RYE DISTIL-
LING CO.
S. V. NAGLE, *President.*

Address all Communications to Miller Pure Rye Distilling Company Philadelphia, Pa.
Special Notice.—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed: Miller Pure Rye Distilling Company, S. V. Nagle President. Valid only when signed by the President or Vice President of the Company.

29 EXHIBIT "B".

No. 5455 55 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from Ourselves Fifty-five (55) barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Su-ject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident. Deliverable only upon Surrender of this Certificate, Payment of Tax and other Charges due Thereon, and Storage at the rate of five cents per barrel per month, from August 26th 1907.
Inspection Spring 1907.
Stored in Warehouse No. 2.
7654-7658
Serial Nos. of Packages 8279-8328

MILLER PURE RYE DISTIL-
LING CO.
S. V. NAGLE, *President.*

Address all Communications to Miller Pure Rye Distilling Company Philadelphia, Pa.
Special Notice.—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed: Miller Pure Rye Distilling Company, S. V. Nagle President. Valid only when signed by the President or Vice President of the Company.

30 EXHIBIT "C".

No. 5456 120 bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from Ourselves One hundred twenty (120) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, the Elements, Leakage, Evaporation or Accident. Deliverable only upon Surrender of this Certificate, Payment of Tax and other Charges due thereon, and Storage at the Rate of Five Cents per Barrel per Month, from August 26th 1907

Inspection Spring 1907.
Stored in Warehouse No. 2.
Serial Nos. of Packages 8159-8278

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *President.*

Address all Communications to Miller Pure Rye Distilling Company Philadelphia, Pa.

Special Notice.—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed: Miller Pure Rye Distilling Company, S. V. Nagle President. Valid only when signed by the President or Vice President of the Company.

31 EXHIBIT "D."

$2,500. READING, PA., *August 27th*, 1907.

Four months after date I promise to pay to the order of The Penn National Bank of Reading, Pa., at The Penn National Bank of Reading, in Reading, Pa., Twenty-five hundred no/100 dollars without defalcation for value received; having deposited with the said Bank as collateral security for the payment of this and any other past and future indebtedness, liability or liabilities of the undersigned to the said The Penn National Bank of Reading, or the holders thereof, due or to become due or that may hereafter be contracted, the following property, to wit: 200 bbls. whiskey in bonded warehouses at Womelsdorf, Pa., as per Warehouse Rects. gauger's ctf. &c. accompanying, the present market value of which is $— and do hereby agree to deposit forthwith with the holder of this or any other liability or liabilities of the undersigned such additional

security as they may from time to time request; and, in default thereof, such liability shall at once become due and payable, as though it had actually matured; and upon default of payment at maturity, whether such maturity be according to the terms of the instrument or shall occur by default in depositing additional security as above agreed, do hereby authorize and empower the holders thereof, for the purpose of liquidation of any liability of the undersigned and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such property, or any additions thereto, or substitutions therefor, without any previous demand, advertisement or notice either at Broker's board or public or private sale at any time, or times hereafter; with the right on the part of such holders to become the purchasers and absolute owners
32 thereof, free of all trusts and claims. And it is further agreed that the said property, together with any previously deposited or that may be deposited or pledged hereafter, shall stand as one general continuing collateral security for any and all obligations of the undersigned, so that the deficiency on any one shall be made good from the collaterals for the others; the undersigned hereby remaining responsible for any deficiency in payment, and hereby waiving all benefit of any stay of execution or any exemption of property from execution or any privilege under any law now or hereafter to be in force.

Due —— —.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *Pres't.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In re MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

To Alfred Driver, Esq., Referee in Bankruptcy:

The amended answer of Joseph A. Taney, trustee, to the second amended petition of the Penn National Bank of Reading, Pennsylvania, respectfully avers as follows:

That it is not true that the Penn National Bank of Reading is the absolute owner of two hundred barrels of whiskey in the Warehouse of the Miller Pure Rye Distilling Co. although your respondent admits that warehouse receipts were issued therefor to said bank as collateral security for certain promissory notes named in the first amended petition.

33 Your respondent further avers that the said whiskey at the time of said sale was of the value of fifty-five cents per gallon in the open market free and discharged of all Revenue taxes and other charges, and that a sale under favorable conditions would have produced at least that price.

Your respondent further avers that there has been no delivery of the said whiskey or any part thereof in any manner whatsoever

and that the said whiskey was under the exclusive control and direction of the Miller Pure Rye Distilling Company at the time of the execution of the warehouse receipt.

(S'g'd) JOSEPH A. TANEY, *Trustee.*

EASTERN DISTRICT OF PENNSYLVANIA, ss:

Joseph A. Taney being duly sworn according to law deposes and says that he is the above named respondent and that the facts above set forth are true.

(S'g'd) JOSEPH A. TANEY.

Sworn to and subscribed before me this 4th day of December, A. D. 1908.

(S'g'd) ALFRED DRIVER,
Referee in Bankruptcy.

34 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

Re MILLER PURE RYE DISTILLING CO.

Certificate of Referee.

MCPHERSON, *District Judge:*

This dispute presents an important and interesting question—What effect should be given to the pledge of a storage receipt covering packages of whiskey in a distiller's bonded warehouse? The creditors' petition was filed on Feb. 3, 1908, and if the whiskey was property which the bankrupt could have transferred by any means before that date, or which might have been levied upon and sold under judicial process against the company, the trustee afterwards acquired the title that might thus have been transferred, or been levied upon and sold at judicial sale. If the pledge of the receipts pledged the whiskey, the trustee's title is subordinate; otherwise, the adjudication gave him the complete ownership. The relevant facts are as follows:

On August 27, 1907, the Penn National Bank of Reading, Pa., lent $2,500 to the bankrupt, a corporation then engaged in distilling whiskey at Ryeland, or Womelsdorf, both names being used in the evidence. The company secured the loan by giving its note at four months, and also pledging as collateral three warehouse receipts and certain gauger's certificates covering 200 barrels of whiskey in the company's bonded warehouse. The note contains the usual collateral provisions. It states, inter alia, that the company has deposited with the bank as collateral security 200 barrels
35 of whiskey in the bonded warehouse at Womel-dorf as per warehouse receipts and gauger's certificates accompanying

the note; and in the event of default at maturity authorizes the holder to sell, transfer and deliver the whole or any part of the whiskey without any previous demand, advertisement or notice, either at public or private sale, with the right on his part to buy the property free of all trusts and claims. A copy of one of the receipts, duly endorsed by the company, is as follows:

"No. 5454. 25 Bbls.

First District of Pennsylvania United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August* 26, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whisky Distilled, Marked and Numbered as per record, attached, subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon, and storage at the rate of five cents per barrel per month, from August 26th, 1907.

Inspection Spring 1907.
Stored in Warehouse No. 2.
Serial Nos. of Packages 7964/7988.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *President.*

SPECIAL NOTICE.—Particular care should be taken of this certificate as the whiskey cannot be delivered without its surrender."

36 The gauger's certificates accompanied the receipts, and are dated between April 23 and June 1, 1907. The note was not paid at maturity, and on February 5, 1908, the bank, after advertisement and notice to the company or its representatives sold the receipts at public sale and bought them in for $200. Thereafter the bank offered to pay all taxes and charges, and asked the referee for an order, directing the trustee to take whatever steps might be required under the internal revenue laws to bring about the physical delivery of the whisky to the bank. In reply the trustee denied that the bank had become the owner, averred that no delivery had ever been made, and asserted that the whiskey was under the company's exclusive control and direction when the receipts were executed and pledged. Numerous other claims of a similar kind were presented to the referee, and much testimony was taken. By agreement all the evidence applies to all the claims, and I understand also that they will all be disposed of by the decision in the case now under discussion. The referee refused the order, holding that the trustee as the representative of the general creditors could successfully attack the pledge of the receipts—the ground of the decision being, that the whisky itself had not been validly pledged, because it had not been delivered either actualiy or constructively. The company continued therefore to be the owner, and the trustee succeeded to its title.

As already stated, the bank bought in the receipts on Feb. 5, and thus became their formal owner; but the sale was held two days after the petition in bankruptcy was filed and can have no effect upon the pending question. If the bankrupt could have transferred the whisky on Feb. 3, or if a creditor could then have sold it under judicial process, the title passed to the trustee when the adjudication was afterwards entered. For present purposes the sale on
37 Feb. 5 is not material. If the pledge of the receipts bound the property, the bank's petition should have been allowed; if failure to deliver the whisky made the pledge invalid, the subsequent sale could not give it life. What effect then did the issue and pledge of the receipts have upon the rights of general creditors? There is no doubt that the pledge was for value and was without fraud in fact, and that it was made more than four months before the petition in bankruptcy was filed. But these considerations are not decisive; if the pledge was fraudulent in law because the whisky was not delivered, either actually or constructively, the bank acquired no rights against general creditors, and has no valid claim upon the property.

Save in one respect, the case cannot be distinguished I think from Re Millbourne Mills Co., (C. C. A.) 172 Fed. 177; and unless the distinction justifies the application of a different rule, the order of the referee was right. In my opinion, however, a material difference between that case and this is to be found in the fact that the pledged property here was stored in a bonded warehouse established and maintained under the laws of the United States. It is true that the whisky did not cease to belong to the company, simply because it was stored in the warehouse. It was the product of the bankrupt's skill, labor and capital, and in no sense belonged to the government. The stringent regulations of the federal law concerning the custody of distilled spirits are intended to protect the government's right to the tax. They have no other ultimate purpose, but I think it cannot be denied that these regulations interfere so seriously with the owner's right to deal freely with the spirits, that property in such a situation should not be treated as grain and flour, for example, are treated in the warehouse of a milling company. In the case of a milling company, nothing except the convenience or the desire of the parties pre
38 vents the company from delivering possession of the grain or flour to the pledgee; and therefore, if they choose to make a contract or pledge without actual or constructive delivery of the property, they must abide the consequences. But delivery of spirits in a bonded warehouse cannot be offered by a pledgor nor accepted by the pledgee. The spirits must remain where they are until the tax is paid and the government formally permits the removal. The peculiar situation in which the federal law has placed this kind of property will appear more fully in a moment, but I may anticipate the reference to the statutes in order to say at once that in my opinion the rule now applicable is not the general rule that is so fully discussed in re Millbourne Mills Co., but the well-known exception that seems to have been announced for the first time in Pennsylvania in Linton v. Butz, 7 Pa. 89. In that case a machine was sold while it was in the hands of a third person as bailee, and the vendee did not

disturb the possession. It was afterwards levied on and sold as the property of the vendor, but the vendee recovered its value in an action of trespass against the execution creditor, the Court saying:

"* * * (To) constitute a valid assignment of personal property against an execution, there must be a delivery accompanied and followed by a continuing possession in the assignee. And where the possession does not follow as well as accompany a transfer, it is a fraud in law, without regard to the intent of the parties. It is not sufficient that the assignor gives to the assignee a delivery which may be symbolical or constructive, or a temporary delivery, and then takes the articles back into his own possession, and keeps and uses them as before. The case in hand differs in two particulars from the cases cited. Here, at the sale, the article sold was not in the possession of the vendor, but in the hands of another, as bailee; and the
39 vendor did not take it again into his own possession. Hence the property being in the hands of the bailee, the only possession was given of which it was susceptible. This is all that is required. Thus nothing is more common than a transfer by a principal of goods in the hands of a factor, and no one doubts it is a valid transfer, subject only to any lien which the factor may possess. So a transfer of goods at sea, which are in the possession of the master of a ship, is deemed a valid transfer, and if he refuse to deliver them, upon due demand and refusal, the vendee may maintain suit against him for the recovery of them or their value. In a case of bailment the property passes when the sale is completed, and no formal delivery is necessary."

Other decisions recognizing Linton v. Butz are Worman v. Kramer, 73 Pa. 385; Woods v. Hull, 81* Pa., (32 Smith) 453; Stephens v. Gifford, 137 Pa. 232; and Caulfield v. Van Brunt, 173 Pa. 433. It is true that the government was not a formal and technical bailee of the whisky, but its possession and control, were of such a character as not to be distinguishable in effect from possession and control under a bailment. Whisky in a bonded warehouse is in a peculiar situation. Usually, the title is in the distiller, and it is also true that for certain purposes he may be said to have some degree of possession, custody or control. At all events, he comes within the terms of a statute which subjects spirits to forfeiture if they be found in "the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of such taxes;" United States v. 36 Barrels of High Wines, Fed. Cases, No. 16,468, 7 Blatchford, 459. But the subject must now be approached from
a different point of view. How are the general creditors
40 of a distiller affected by the situation and surroundings of spirits belonging to him and stored in his bonded warehouse? Does the distiller appear to be the owner? Has he such apparent possession as indicates the power to dispose of the property freely? Does he obtain a false credit by seeming to have the sole right to sell or pledge? As creditors are bound to take notice of the federal

statutes governing a bonded warehouse, let us look at the provisions that are now relevant.

A distiller is required to provide at his own expense a warehouse in which nothing but spirits may be stored. The warehouse must have no doors or windows leading into the distillery or into any other room or building, and must be under the direction and control of the collector of the district, and in immediate charge of a storekeeper who is assigned to this duty by the Commissioner of Internal Revenue. In this warehouse the spirits may remain for eight years, but they may be withdrawn at any time during that period. Comp. Statutes, page 2122. If the Commissioner thinks the warehouse unsafe or unfit for use, he may require the distiller to provide another and to remove the spirits at his own expense. Ibid, 2123. The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. The warehouse must not be unlocked or be opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. Ibid, 2124. Any revenue officer at any hour of the day or night may enter the building to examine, gauge, measure and take account of the spirits. Heavy penalties are denounced if his attempt to enter is
41 obstructed by the distiller. Ibid, 2125. Immediately upon distillation, the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used, and regulate their brands and stamps. Ibid, 2130, 2132. A formal entry that the spirits have been deposited in the warehouse must be made with the collector, the storekeeper and the Commissioner, and a bond for the payment of the tax must accompany the entry. Ibid, 2133. Immediately after the tax has been paid, the spirits must be removed under penalty of forfeiture. Ibid, 2132. This removal is carefully guarded, and can only take place on the collector's order. Ibid, 2135-36. There are heavy penalties for removing spirits from the warehouse except as provided by law, and these penalties may be inflicted although no intent to defraud may exist. Ibid, 2136.

There are other provisions applicable to a distiller's warehouse, but these will suffice, I think, to show that in no proper sense can a distiller be said to "make a warehouse of himself as to his own goods"—to use the language of the Millbourne Mills case. He has no choice in the matter; he must provide the place of storage, must surrender control to the government's officers, and must forego the right even to enter his own building except by permission and in the presence of the storekeeper. Moreover, he may not keep the spirits in the warehouse as long as he pleases. He must give bond for the payment of the tax, but even after the tax is paid he does not thereby regain control over the spirits, so that he may keep them where they are; for as soon as the tax is paid, whether by the distiller himself or by the purchaser, they must be removed from the warehouse or be

subject to forfeiture. To treat property stored under these restrictions as if it were freely at the disposal of the owner, is I think out of the question. If the owner of flour or grain chooses to
42 sell or pledge it, no external power prevents him from making delivery; and if delivery, either actual or constructive, is not made, the public may well conclude that the ownership still accompanies the possession. But here is a species of property over which the legal owner has almost no control. As soon as he makes it, he must put it into a warehouse in the charge of a government officer. After that time he cannot even see it except by permission, and apparently he cannot mark the packages except as the law prescribes. He is liable for the tax upon it, but he cannot go on storing it after he pays the tax but must remove it without delay. The public, therefore, who only see the outside of a bonded warehouse, but are nevertheless chargeable with knowledge of the federal statutes, cannot be misled by the continued presence of the spirits. The government's complete control is well known, and the fact that the spirits remain in the warehouse is equally consistent with the distiller's title as owner, or with the tile of a buyer or pledgee. Neither buyer nor pledgee can take delivery without paying the tax, and neither is bound to make payment until actual removal is desired. At no time can it be said that the spirits are in the exclusive possession of the bankrupt. Every step even of the manufacturing process is carefully supervised by the government, and the bankrupt is never able to deliver possession of the product to a third person without violating the law. Ibid, 2120-21.

To the public, therefore, including its general creditors, a distilling company is never able to assume such appearance of prosperity as the possession of personal property ordinarily gives. Indeed, the public are excluded from the warehouse, and the quantity of spirits that are stored therein can only be a matter of conjecture. But even if the quantity should be actually known there would be little advantage in such knowledge, for the government's hand is
43 upon it all, whether the packages are many or few. It is so completely in the government's actual control and possession that it can not be levied upon by judicial process in the hands of a sheriff. This was decided in McCullough v. Large, 20 Fed. 309, by Mr. Justice Bradley and Judge Acheson, who held that whisky deposited in a bonded warehouse of the United States, and held therein for internal revenue taxes due the government, is virtually in the possession of the United States, and that a sheriff has no right to enter the warehouse and levy upon the whisky as the property of the defendant, even though the sheriff may offer to pay the tax.

But how then is this property to be dealt in? Is the owner to be debarred from deriving any benefits from it unless he can find a buyer or creditor who is ready to take immediate possession? It is well known that spirits would lose much of their value, if they could only be sold under such a restriction, and it is therefore not surprising to find that the natural expedient has been adopted, of substituting warehouse certificate or storage receipts in place of the

whisky itself. As the government is in effect a bailee, the situation is practically the same as in the case of ordinary articles deposited in a storage warehouse of the usual character. In such event the storage receipts may be freely sold or pledged, and there seems to be no good reason why similar receipts for bonded spirits should not have the same position in the markets of the country. In fact they do have this position now, unless the courts shall refuse to recognize it; for it is the unbroken custom of the trade—the evidence leaves no doubt upon this point—to treat storage receipts for spirits as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question.

In the present case there are many claimants against the
44 spirits in the bankrupt's warehouse, some putting the claim upon a pledge, most of them upon a sale, the transactions extending over the period from March, 1903, to the end of 1907. They would be greatly astonished I think to be advised that transactions three or four years old, carried out according to a well known and universally established custom, were voidable at the option of the trustee in bankruptcy because the property sold or pledged had not been physically delivered when the sale or pledge took place. And the soundness of the reason supporting such a result would be more difficult to appreciate, if such claimants were also told that their receipts were not valid because the spirits had been placed in the distiller's own warehouse, but would have been valid if the spirits had been placed in a general bonded warehouse, although in all other respects there would have been no difference between the two places of deposit. General warehouses not connected with a distillery may be established and spirits may be stored therein. 2 Comp. Stats. 2143 et seq. The regulations and restrictions of the internal revenue laws apply to these places of storage just as they apply to a distiller's own warehouse; but in the case of a general bonded warehouse there can be no doubt that the proprietor is a bailee, and that physical delivery of property in his warehouse is not necessary in order to validate a sale or a pledge. It would be difficult, I think, to justify the conclusion that delivery of storage receipts would deliver the spirits in the one case but would not deliver them in the other, since the conditions are essentially the same in both, and give equally effective, or ineffective, notice to the public.

It is of course true that unless a buyer or pledgee of storage receipts takes certain precautions—for example, gives notice to the government officials, assuming such notice to be sufficient—
45 he may be defrauded by a second sale or a second pledge of the same property. This happened in Miller v. Browarsky, 130 Pa. 372. But the possibility of such a fraud has no bearing upon the question now under consideration. There is no dispute at present between two persons, both of whom are innocent purchasers or pledgees, the question now being this; whether any innocent purchaser or pledgee of a bonded warehouse receipt can get a good title to the whisky without taking actual possession.

The decision of the referee is therefore reversed, and he is directed

to make an appropriate order under which the bank may be put into possession of the whisky in dispute.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Decree.

And now, February 12, 1910, in conformity with the opinion filed by the court on February 10th, 1910, upon motion of Philip S. Zieber, attorney for the Penn National Bank of Reading, it is ordered, adjudged and decreed that the decision of the Referee dismissing the petition of the Penn National Bank of Reading for an order upon the Trustee to execute such writings as may be required by law for the delivery of two hundred (200) barrels of whiskey serial
46 numbers 7964 to 7988 inclusive, and 7654 to 7658 inclusive, and 8279 to 8328 inclusive and 8159 to 8278 inclusive and to cause delivery of the same is reversed, and it is further ordered that the said trustee shall execute such writings and take such steps as may be requisite to deliver or obtain delivery of the said 200 barrels of whiskey to the said Penn National Bank of Reading upon payment by said bank of the charges and storage as required by the terms of the certificates issued for said whiskey by said bankrupt.

J. B. McP.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. Cause No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

By virtue of an order of the court made in the above matter on February 12th, 1910, it is hereby stipulated that the record to be certified to the Circuit Court of Appeals shall consist of the record that was certified to this court on December 24th, 1909, by the referee and of the opinion filed by the Hon. John B. McPherson on February 10th, 1910, and of the Decree entered thereon on February 12th, 1910.

J. H. BRINTON,
Atty. for Trustee.
SNYDER & ZIEBER,
Per J. R. S.,
Attys. for Penn National Bank.

47 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY.

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the Certificate of the Referee for review by the Court together with the papers returned therewith (other than the evidence taken before the Referee); of the Opinion of the Court filed February 10, 1910; of the Decree entered thereon February 12, 1910, as also of the Stipulation of the Parties as to what shall constitute the Record to be certified to the Circuit Court of Appeals.

[SEAL.]

WM. W. CRAIG,
Clerk District Court.

February 14, 1910.

48 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

And afterwards, to wit, on the Fifteenth day of March, 1910, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Circuit Judge, Hon. W. M. Lanning, Circuit Judge, and Hon. R. W. Archbald, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the second day of May, 1911, come the parties aforesaid by their counsel aforesaid, and this case being again called for argument sur pleadings and briefs, before the Hon. George Gray, the Hon. Joseph Buffington, and Hon. W. M. Lanning, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the Nineteenth day of June, 1911, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

49 In the United States Circuit Court of Appeals for the Third Circuit.

No. 5, March Term, 1911.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, Petitioner-Appellant,

v.

PENN NATIONAL BANK OF READING, Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

No. 54, March Term, 1911.

ISAAC N. BOARTS, Trustee in Bankruptcy of the Foxtown Distilling Company, Appellant,

v.

J. M. SELDEN & COMPANY, Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Before Gray, Buffington, and Lanning, Circuit Judges.

GRAY, *Circuit Judge:*

These cases come before us on a rehearing. The first of them was originally argued at the March Term, 1910, and the latter at the October Term, 1910, both being appeals from decrees of the District Courts for the Eastern and Western Districts of Pennsylvania, respectively, sitting in bankruptcy. As the deter-
50 mining question was the same in both cases, they were argued together at the rehearing and will now be considered together.

As to the first case, the facts are briefly summarized from the record and the opinion of the court below, as follows: On August 27th, 1907, the Penn National Bank of Reading, Pennsylvania, loaned $2,500.00 to the Miller Pure Rye Distilling Company for which it made its note to the Bank, payable four months after date, it being stated in said note that there was deposited with the said bank, as collateral security, "the following property, to wit, 200 barrels of whiskey in the bonded warehouse of the Distilling Company at Womelsdorf, Pa., as per warehouse receipts, gaugers' certificate, etc., accompanying." This bonded warehouse was erected by the Distilling Company upon its own premises, pursuant to the requirements of the Revenue Laws of the United States, and was under the control, as hereinafter stated, of the Collector of Internal Revenue for the District.

There was no actual delivery of the whiskey, or of any part of it. The note was not paid at maturity, and on February 5th, 1908,

the Bank, after due notice exposed to public sale the warehouse certificates for said 200 barrels of whiskey, deposited as collateral for said note, and became the purchaser thereof, and claimed, by virtue of said sale, to have become the absolute owner and holder of the said 200 barrels of whiskey embraced in said certificates. On February 3rd, 1908, the creditors' petition in bankruptcy was filed against the said Distilling Company. On February 19th, 1908, said company was adjudicated a bankrupt, and on March 24th, 1908, the appellant, Joseph A. Taney, was duly appointed Trustee in Bankruptcy. Thereafter, the Bank, by its peti-
51 tion, offered to pay all taxes and charges, and asked the Referee in Bankruptcy for an order, directing the Trustee to take whatever steps might be required under the Internal Revenue Laws to bring about the physical delivery of the whiskey to the Bank. In reply, the Trustee denied that the Bank had become the owner, and averred that no delivery had ever been made, asserting that the whiskey was under the Distilling Company's exclusive control and protection when the receipts were executed and pledged. The Referee refused the order, holding that the Trustee, as the representative of the general creditors, could successfully attack the pledge of the receipts, taking the ground that the whiskey itself had not been validly pledged, because it had not been delivered either actually or constructively; that the Company, therefore, continued to be the owner, and that the Trustee succeeded to its title. A copy of one of the so-called warehouse receipts, duly endorsed by the Distilling Company to the Penn National Bank of Reading, is as follows:

"No. 5454. 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August* 26, 1907.

Received on storage from ourselves twenty-five (25) barrels of Miller Pure Rye Whiskey Distilled, marked and numbered as per record attached subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon, and storage at the rate of five cents per barrel per month, from August 26, 1907. Inspection Spring, 1907.

Stored in Warehouse No. 2, Miller Pure Rye Distilling Co., Serial Nos. of Packages, 7964/7988.

S. V. NAGLE, *President.*

SPECIAL NOTICE.—Particular care should be taken *to* this certificate as the whiskey can not be delivered without its surrender."

52 The gauger's certificates accompanied the receipts and bore dates between April 23rd and June 7th, 1907. Exceptions

being filed on behalf of the Bank to the Referee's Report, the learned Judge of the Court below, in a well considered opinion, (reported in 176 F. R. 606) reversed the order of the Referee, and directed him to make an appropriate order, under which the Bank might be put into possession of the whiskey in dispute.

As to the second case, the material facts, collected from the Report of the Special Master and the Record before us, are as follows: The Foxtown Distilling Company was a partnership owning and operating a distillery at the village of Foxtown, in Westmoreland County, Pennsylvania. For several years prior to the commencement of bankruptcy proceedings, it was engaged in the manufacture and sale of whiskey. On the distillery premises of said company, and constituting a part of it, there was erected, as in the former case, pursuant to the Revenue Laws of the United States, a bonded distillery warehouse, under the control of the Collector of Internal Revenue for the District. In this warehouse, the whiskey claimed by the appellee was entered, with other whiskey, by the Distilling Company, and received, gauged, inspected and marked by a United States gauger, who issued gauger certificates therefor to the Distilling Company.

It is not disputed that, by a transaction purporting to be one of purchase and sale, the Distilling Company sold and the appellee bought and paid for in full 410 barrels of the whiskey thus stored, between the 15th day of May, 1908, and the 12th day of
53 February, 1909, the Distilling Company delivering to the appellee vouchers or receipts therefor, with the gauger's certificates attached thereto. The general form of these so-called warehouse receipts, was the same in this as in the former case, and as in the trade generally. For want of a better name, we will refer to them hereafter as whiskey certificates or vouchers. A copy of one of them is as follows:

"Serial — Wine — Proof — Date —.

Nos.	Gal.	P. F. Gal.	Inspection.	Withdrawn.
1265	4419	100	Feb. 5, '09.	
1266	4573	"	" " "	
1267	4727	"	" 9, "	
1268	4445	"	" " "	
1269	4619	"		
Total	22783			

Gauged by A. C. Barnhart, U. S. Gauger, 23 District.
No. —. 5.

United States Internal Revenue Bonded Warehouse of Foxtown Distilling Co., No. 27, 23rd District, Pa.

YOUNGWOOD, PA., *February*, 1909.

This certifies that I have in this Distillery Warehouse Five Barrels of — Whiskey branded Foxtown Rye Whiskey. Serial Nos. 1265-

1269 inclusive and to be delivered to J. M. Selden Co. or order, or return of this Warehouse Receipt and the payment of tax and charges due thereon. Storage on said whiskey from Feb. 12-09 at 5 cents per barrel per month. Loss or damage by fire, the elements, leakage, evaporation or unavoidable accident at owner's risk. Outage guaranteed not to exceed the tariff bill of 1894.

No allowance after 7 years.

Stored in Warehouse No. — Foxtown Dist. Co. B.

L. N. JOHNSON, *Prop.*

(Endorsed:) J. M. Selden Co., J. M. Selden, Treas."

54 On June 15th, 1909, a voluntary petition in bankruptcy was presented by the partners constituting the Foxtown Distilling Company, upon which petition, on the same day, the said petitioners were adjudged bankrupts, individually and as a partnership, and an order made referring the case to the Referee for further proceedings. Also, on the same day, the appellant, Boarts, was appointed Receiver of the bankrupt's estate. On July 21st, upon the petition of the appellee, Selden & Company, a rule was granted on the Receiver to show cause why he should not deliver to the petitioner the whiskeys claimed by them under the purchase and sale hereinbefore recited. The rule was referred to the Referee, as Special Master, to take testimony and make report, and on March 28th, 1910, the Referee reported recommending that the rule be made absolute, and that the whiskey stored in the warehouse be delivered to the appellee, as the proper owner thereof, upon payment of all taxes and storage charges due thereon. This report was confirmed nisi, April 1st, 1910, by the court below, and afterwards became absolute.

The facts stated in these appeals present, in the first case, the question whether the transaction between the Miller Distilling Company and the Bank was a valid and binding pledge of the whiskey in bond as against the Trustee in Bankruptcy of the Miller Distilling Company, and, in the second case, whether the transaction between the Foxtown Distilling Company and Selden & Company, the claimant of the whiskey, was a valid and binding sale against the Trustee in Bankruptcy of the Foxtown Distilling Company. It should be premised that the records disclose that the pledge in the one case
55 and the sale in the other were for value, and without fraud in fact, and were both made more than four months before the petition in bankruptcy was filed. Assuming that it is not material that the Bank, in asserting its right as pledgee, became the owner of the articles pledged two days after the petition in bankruptcy was filed, it is not controverted that the principles applicable in both cases are the same, and are those established by the law of Pennsylvania, as to sales of personal property.

It is interesting, if not important, to observe that the laws in most, if not all, of our states, which make delivery of possession, actual or symbolical, necessary to a valid sale as against creditors of the vendor, and subsequent purchasers from him, may be referred to the sub-

stance or policy of the Statute of 13th Elizabeth, c. 5, and to the development of the policy of that statute in the decisions of the English Courts. It was a statute intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations as well of lands and tenements as of goods and chattels devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors." The alienations which it denounced as illegal, are those which are feigned and covinous and devised to the end, purpose and intent to delay, hinder and defraud creditors. That the statute referred to actual fraud, is pointed out by Lord Mansfield in Cadogan v. Kennett, Cowp. 432. He is quoted in "Benjamin on Sales," as saying that
56 "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4." And he adds, "These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud." Benjamin says, the question of fraud is treated by the English authorities as a question of fact for the jury, even where the vendor remains in possession, although he had previously stated that the decision of Butler, J., in Edwards v. Harben, 2 T. R. 587, "That if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent," has never been overruled, and that it may be assumed that the law would be held to be the same at the present time. The learned Author concluds that the English authorities "sufficiently establish the proposition that the continued possession by the vendor of goods sold, is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se." The annotator to this learned author has grouped the decisions in a large number of states, as having adopted the English rule in this respect, and the decisions from a smaller group of states, in which Pennsylvania is included, as having adopted the rule in Edwards v. Harben, "that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent."

The significance, however, of the foregoing reference to the origin and growth of the law as to sales of personal chattels in Eng-
57 land and in this country, is that, whether retention of possession by the vendor be evidence of fraud in fact, to be submitted to the jury, or fraud in law, it is in both cases the bald, naked, and unexplained possession of the vendor that is meant. Even a bona fide retention of possession by a vendor tends to the promotion of fraud, where the natural accompaniment of a bona fide sale would be a change of physical possession from the vendor to the vendee. The policy of the law, as it has developed in England and in this country since the Statute of 13th Elizabeth, founded upon practical experience of human affairs, is embodied in the proposition that the mere retention of a physical possession, which is the ordinary accompaniment and indicium of ownership, and which the vendor can transfer to the vendee, is either prima facie evidence of fraud, or fraud per se. The very statement of this rule, however, implies

the qualifications that may be imposed upon it by the varying circumstances of particular cases. In Pennsylvania, where this rule is undoubtedly established, many such qualifications have been recognized. Such cases are, for the most part, outside the rule as above stated, rather than qualifications of or exceptions thereto.

Mr. Justice Gibson, speaking for the Supreme Court of Pennsylvania, in Clow v. Woods, 5 S. & R. 277, said:

"The Stat. 13 Eliz. does not, in words, declare a conveyance of goods fraudulent, where the vendor retains possession; but in general terms renders void all conveyances made to the end, purpose and intent of defrauding creditors. Hence, it becomes incumbent on the Courts to determine, from all the circumstances of the case, whether the conveyances be or be not made with a fraudulent intention; and in judging of that, it is held, that any neglect in leaving the
58 vendor in possession, is fraudulent within the statute. The general rule is, that the possession must be transferred to the purchaser; and to this, I propose to examine such exceptions as have been urged."

After discussing, without approval, some alleged exceptions to the rule, he says:

"It is necessary, not only that appearances should agree with the real state of things, but also, that the real state of things should be honest and consistent with public policy, and that it afford no unnecessary facility to deception. * * * But I take it, where the motive of the sale is merely security to the vendee, and the owner is permitted to retain all the visible marks of ownership, for no other reason than the convenience of the parties, the contract will be void, although the reasons for the arrangement be inserted, and the possession be consistent with the deed * * * The inclination of my mind is to give the statute a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining its exceptions to those cases, where, in the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by and which constituted the motive for entering into the contract. Where possession has been withheld pursu-nt to the terms of the agreement, some good reason for the arrangement beyond the convenience of the parties should appear."

In McKibben v. Martin, 64 Pa., 352, Mr. Justice Sharswood, speaking for the Supreme Court of Pennsylvania, refers to the case of Clow v. Martin (supra) as the "magna charter of our law upon this subject. The principles settled in that case have been recognised and affirmed by a bead roll of subsequent decisions which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law, wherever the subject of the transfer was capable of delivery
59 and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession." He quotes Chief Justice Gibson, as follows:

"As remarked by an eloquent writer, these Statutes of Elizabeth

produce the most beneficial effects, by placing parties under a disability to commit fraud, in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume; and they seem to have been expressed in general terms purposely to leave room for a large interpretation by the judges who, in accordance with the spirit rather than the words, have engrafted on them such artificial presumptions and legal intendments as are ordinarily subjects of judicial construction."

The learned judge afterwards cites, by way of illustration, cases in which the law has been interpreted in accordance with its real meaning, and says:

"But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer."

The spirit of these admirable statements as to the law governing sales of personal chattels in Pennsylvania, has not been departed from in subsequent decisions of the Supreme Court, but they have been applied with intelligent recognition of their philosophy to the changed conditions of business, brought about by increasing population, wealth and commercial activity. In Crawford v. Davis, 99 Pa. 576, Mr. Justice Mercur uses this language:

60 "The general rule is, that the sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale. In determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties, is required."

This language is repeated in the case of Pressel v. Bice, 142 Pa. 263, and the substance thereof in many other cases. In a late case, Barlow v. Fox, 203 Pa. 114, the Supreme Court said:

"When by the action of the parties there has been a *a* separation of the title and possession of personal property, courts will scrutinize the transaction to determine the real intention, and but little regard will be given to the form which it has taken or the name by which it is called. The law is liberal in not requiring an actual change of possession when it will defeat the lawful purpose of the parties."

In Stephens v. Gifford, 137 Pa. 219, the Supreme Court said, what is especially noticeable in its application to the present case:

* * * the duty of the purchaser was affected by the nature of the transaction, and that a delivery in accordance with the usages of the trade or business in which the sale was made, was a sufficient delivery."

And in the very recent case of White v. Gunn, 205 Pa. 229, Mr.

Justice Brown has, with great clearness and full apprehension of the spirit of the law in this regard, said:

61 "What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

There are many other cases which it would be a work of supererogation to cite. It suffices to say that the law of Pennsylvania in respect of the question we are now considering is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the circumvention of fraud and deceit in sales of personal property, (which nowhere in terms refers to retention of possession by a vendor) it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the vendee, such retention is fraud per se, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the Courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is

62 excused by the usages of the trade or business in which the sale was made. These exceptions (as they are sometimes called) to the rule, of not divorcing possession from title to personal property, are generally recognized by the courts both in this country and in England; and in Pennsylvania, the line of demarcation between the cases which do or do not fall within the rule, has been laid down by the courts with singular clearness and precision.

Tested, then, by the law of Pennsylvania, as we have stated it, what is the legal character of the transactions presented by the cases with which we are here concerned? The following facts seem to be clearly established by the records before us:

The whiskey was not so in the physical possession of the Distilling Company, as to render possible a delivery at the time that the pledge was made in the one case and the sale in the other, consistent with the avowed and fair purpose of the transaction. The facts in support of this proposition must be examined with some care, as the contrary has been contended with much force and ability.

The excise tax on whiskey is one of the most fruitful sources of revenue possessed by the Federal Government, and the Internal Revenue laws and the Treasury Regulations made in pursuance

thereof, provide for and safeguard its collection with the most scrutinizing care and particularity. It is well known that a marketable product is not the result of mere distillation of the liquor from grain or fruit. In fact, its change into such a product may be said to be hardly begun when it makes its appearance in the tank or
63 cooling vats. It requires to be skillfully cared for and ripened, and for the ripening process it is necessary that the whiskey should be stored in wood for several years. The tax on whiskey is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whiskey itself, the tax of $1.25 a gallon being about five times the ordinary value of the whiskey at the still. It is manifest that this extraordinary tax could not be collected on the whiskey as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax. As this involved quite a number of years, the government, for the convenience of the distiller, as well as for the protection of its own revenue, has provided by law for the custody and control of the whiskey from the time it leaves the still until, being properly aged, it has become marketable, or until it is convenient for the distiller or owner to pay the tax thereon and withdraw the same from such custody. Where the amount of the tax is so much out of proportion to the value of the whiskey, a great temptation is presented to evade the payment of the same. To guard against this, the government, by most carefully framed provisions of law
64 and regulation, takes charge of the liquor from the time it issues from the still until it is withdrawn from its custody by the distiller or owner, upon payment of the tax. These provisions of law are most minute and occupy many sections of the Revised Statutes. Of these it may be well to recite in full the following:

"SEC. 3271. Every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the Collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner.

* * * * * * *

"SEC. 3273. The storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith; and every storekeeper shall have charge of the warehouse to which he is assigned, and of such distillery, under the direction of the collector controlling the same."

"SEC. 3274. Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

Whenever, in the opinion of the Commissioner of Internal Revenue, such distillery warehouse is unsafe or unfit for use, he may discontinue such warehouse and require the merchandise
65 therein to be transferred to such other warehouse as he may designate. Such transfer shall be made under the supervision of the Collector, or such officer as may be designated by the Commissioner, and the expense thereof shall be paid by the owner of the merchandise. (Sec. 3272.) In this warehouse, spirits may remain for eight years, and they may be bottled after four years, but not before, and may be withdrawn at any time, upon the payment of the tax and charges. (Act of August 27th, 1894.) As said by the learned Judge (McPherson) of the court below, the warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened, or remain open, except in the presence of the storekeeper, or his lawfully designated representative, and no articles may be received or taken out, except by the Collector's order, addressed to the storekeeper. (Sec. 3274.) Revenue officers may, at any hour of the day or night, enter the building to examine, gauge, measure, and take account of the spirits. (Sec. 3276.) Immediately upon distillation, the spirits must be placed in a warehouse in casks or packages, as provided by law, and shall thereupon be gauged, proved and marked by an Internal Revenue Gauger, who shall cut on the cask or package containing such spirits, in a manner prescribed by the Commissioner, the quantity in wine gallons and in proof gallons of the contents of such casks or packages. The same shall be cut
66 on the head of such cask, "and the Gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the Collector of the District and the storekeeper and gauger." Written upon the stamp must be the number of proof-gallons, the name of the distiller, date of receipt in the warehouse and the serial number of each cask or package. This stamp must be signed by the United States Storekeeper and by the United States Gauger. (Sec. 3287.) As a matter either of regulation or

of practice, a gauger's voucher or certificate containing these particulars is delivered to the distiller. In the last of the cases at bar, the Master finds that the United States Gauger gave the paper certifying to the receipt, inspection, gauging and marking of the barrels of whiskey in question, and he finds in addition that there is a blank space left in this document in which may be noted withdrawals of the whiskey. The same is true also as to the certificates in the first case. It was stated without contradiction in the course of the testimony, at the trial in the latter case, that without conspiracy with the gauger, these receipts could not be duplicated. There are heavy penalties for removing spirits from the warehouse, except as provided by law, and these penalties may be inflicted, although no intent to defraud may exist.

It is found as a fact in both cases, that the whiskey in question was in such bonded distillery warehouses of the United States, as above described, at the time it was pledged or sold as herein-
67 before stated, and under the control and custody of the officers designated by law. That such control was exclusive, is apparent from the provisions of the law as above pointed out, and it seems little less than absurd to say that the distiller was in possession of this property, when he could have been put in prison if he had attempted to take possession of it. It was property thus situated and circumstanced that the pledgor in the one case intended to pledge and believed that he was pledging, and the vendor in the other intended to sell and believed he was selling, and the legal title to which the pledgee and vendee, respectively, had good reason to believe they had received. It is true, they relied largely upon the transfer of the so-called warehouse receipts, but attached to these receipts were the Gauger's certificates, specifying by serial number and brand the particular barrels of whiskey that were the subject of the sale, and nothing required by such a sale of pledge was left undone by vendee or pledgee. At common law, sales of personal property do not require to be documented, though documents, such as bills of sales and warehouse receipts, may be convenient evidence of such a sale.

We think the transactions here under consideration, between the pledgor and pledgee and the vendor and vendee are quite within the spirit and meaning of the rule as to sales of personal property, established by the decisions of the Supreme Court of Pennsylvania. No aspersion is attempted to be made of the perfect good faith ob-
taining in each case. To all the world, but especially to
68 those engaged in the business of distilling and of buying and selling whiskey, it was apparent that the physical custody and control of the whiskey here in question was not in the distiller and vendor, but in the Revenue Officers of the United States, and in neither case was the distiller capable of making physical delivery to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated. It was a situation created and

established by a law of the United States, of which all persons, creditors as well as others, were presumed to have had knowledge.

It is true that in these cases there had been no technical bailment of the goods sold or pledged, and some confusion of mind and embarrassment at the argument seems to have resulted from the attempt to liken the deposit of these goods in a distiller's bonded warehouse to a common law bailment, where the bailee assumes a definite duty to the bailer or his transferee. But the courts of Pennsylvania, as well as elsewhere, have not concerned themselves with technicalities, or allowed themselves to be embarrassed by the mere names of things. It does not matter whether this custody by the government's officials be classified as a bailment, or not. The real question is, whether the goods, at the time the sale and pledge were made, were out of the possession of the vendor and in the possession of another for a lawful purpose, recognized as such, not only by the vendor and vendee, but by all engaged in that business. The physical possession was not transferred, because
69 it was out of the power of the vendor to transfer the same, without the payment of a tax many times the value of the goods sold, one of the very objects of the law providing for the government's custody of the whiskey presumably being that the payment of the tax might be deferred for a number of years without interfering with the right to transfer the property therein.

This brings us to the not unimportant considerations, that founded upon this statute of the United States, and in promotion of its general purpose, the custom and usage, of which these records compel us to take notice, has grown up in the trade, to freely buy and sell whiskey in such bonded distillery warehouses, such sales being evidenced by the delivery of these storage certificates and so-called warehouse receipts, in lieu of the physical possession which the distiller or owner is incapable of delivering without a surrender of the privileges the statute was intended to provide. In his opinion in the Taney case, the learned judge (McPherson) of the court below finds as a fact that the evidence leaves no doubt upon the point, that it is the unbroken custom of the trade to treat these storage certificates as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question. In so far as the custom sanctions the underlying sale and purchase of whiskey thus situated, and recognizes these certificates and so-called warehouse receipts as evidence thereof, the custom is reasonable and within the philosophy of the rule which dispenses with the necessity of delivery of physical possession, where the possession is not in the vendor but in a third person for a lawful pur-
70 pose, and the non-delivery is consistent with the honest intent and object of the sale. So that, even if this custom of the trade of long continuance, and reasonable in itself, were in some particulars inconsistent with the general rule of law, but not conflicting with any settled public policy, it might settle the question in hand. From what we have said, it is apparent that it is not inconsistent with either public policy or public law in the state of Pennsylvania.

The contention has been strenuously made, that the certificates

and receipts in controversy are documents of a statutory origin, and that their force and effect involve the construction of a statute of the state of Pennsylvania. The statute referred to is the Act of September 24th, 1866, Purd. Dig. vol. 1, p. 393. It provides that "warehouse receipts given for goods, wares and merchandise * * * stored or deposited with any warehouseman, wharfinger or other person in this state * * * shall be negotiable and may be transferred by endorsement of said receipt or bill of lading; and any person to whom said receipt or bill of lading may be so transferred shall be deemed and taken to be the owner of the goods, &c., therein specified, so as to give security and validity to any lien created on the same." It further provides that "no property on which said lien may have been created shall be delivered by said warehouseman * * *, except on the surrender and cancellation of said original receipt or bill of lading."

It is plain that these provisions of the statute have to do with ordinary bailments with public warehousemen or other persons receiving goods in custody from another as a matter of business,
71 and giving receipts therefor. If this statute accomplishes anything, it is to render certain the legal character and negotiability of such warehouse receipts as it describes, and to enforce the performance of the duties undertaken by the warehousemen. The relative rights of bailor and bailee and of warehousemen in general are well established and settled by the common law. For the purposes of the transactions referred to in this statute, the bailee or warehousemen must be a third and independent person betwe-n the bailor and the purchaser or pledgee to whom the receipts are delivered. The statute does not authorize a man to become his own bailee or his own warehouseman, and the courts have frowned upon any attempt to allow him to assume that position. (Security Warehousing Co. v. Hand, 206 U. S., 415.)

In the case of Bank v. Jagode, 186 Pa. 556, Chief Justice Mitchell, speaking for the Supreme Court of Pennsylvania, of the provisions of this Act, said:

"But, in order to have this effect, the requisites of the statute must be complied with, and plainly the first of these is, that there must be a receipt issued from a bona fide warehouse * * * These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business interest and good faith of the warehouseman and the penal consequences of any breach of duty by him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, while the goods remained under his own control, or subject to levy by his creditors."

72 It is plain that the papers which accompanied the gauger's certificate, and which were delivered by the distiller to the pledgee or the vendee, were framed with a view of placing the pur-

chaser in a situation in which he could avail himself of the provisions of this warehouse law. But, as we have just seen, the distiller could not become his own warehouseman, and we think it must be apparent from our previous discussion of the United States Statutes in regard to distillery warehouses, that it was not intended to place the government, through its officers or agents, in the position of a warehouseman for the distiller. It is true, that by regulation or practice, the gauger's certificate is given to the distiller, but neither the gauger nor inspector assumes thereby the responsibility of a warehouseman. There is no voluntary act of bailment on the part of the distiller, nor contractual relation assumed by the officers designated to secure the revenue tax due the government. The relation between the distiller and the officers of the government in custody of his whiskey, is sui generis. It is prescribed by law and is not contractual. But a situation is thereby created, as above described, which in our opinion brings both of the cases before us within what we think is the well settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property, as against creditors, to be made in the absence of a physical delivery of the property sold.

This court has recently, in the case of the Fourth Street National Bank v. Millbourne Mills Co., Trustee, 172 Fed. Rep. 177,
73 had occasion to consider and administer the law of Pennsylvania in regard to sales of personal property without delivery of possession. In that case as in these, the question arose between the Trustee of a bankrupt corporation, representing its creditors, and the claimant of certain goods in the hands of the trustee, under a pledge made by the bankrupt company more than four months prior to the bankruptcy. The learned counsel for the appellees in the cases now before us, has relied upon that case as supporting the contention as to the invalidity of the pledge and sale of the whiskey in question as against trustees in bankruptcy. The cases, however, are entirely different, and the facts and circumstances of the case cited will serve to illustrate and emphasize the position taken as to the cases at bar. The Millbourne Mills Company as a security for a loan from the Fourth Street National Bank, prior to the adjudication of bankruptcy, attempted to make certain pledges to the bank, of grain and flour in store at its mills. The company issued certificates after the manner of warehouse receipts, of the quantity of these commodities on hand, stating that it held them subject to its order, and endorsed the same to the bank, the property, however, remaining in the possession and under the control of the company, and there being nothing outside of the certificates to indicate the right of the certificate holders to it. The barrels of flour called for in the certificate were kept together in the company's mills, but were not segregated or marked in any other way than by occupying a certain position on the floor of one of the mills, between certain
posts. No agent or servant of the bank had any custody, con-
74 trol or supervision of this flour, nor was there anything to indicate that it differed, as to title, in any respect from other goods of the same kind in the said mill, except as above indicated.

The grain called for in the certificates was grain in certain tanks, which were constantly being filled and drawn from and refilled, as the business of the Milling Company required. It was a bald case of retention by the pledgor of the possession of goods capable of delivery, and without any reason for the non-delivery, except the convenience of the parties. By express provision of the Bankruptcy Act, the trustee is vested with the title of the bankrupt, as of the date of adjudication, to all property which, prior to the filing of the petition, might have been levied upon and sold under judicial process against him, and as such, the grain and flour there in question was decided to be such property. In the cases at bar, however, the whiskey is so completely in the government's actual control and possession, that it cannot be levied upon by judicial process in the hands of a sheriff. This was decided in McCullough v. Large, 20 Fed. 309, by Mr. Justice Bradley and Judge Acheson. What we have already said as to the facts and circumstances of the cases at bar, indicate the difference of the two situations, and it is not necessary to further dwell upon them, after the clear and satisfactory discussion of the same by the learned judge (McPherson) of the court below.

As the reason for the rule making fraudulent, as against creditors, transfers of personal property, unaccompanied by actual delivery, is based upon the policy of preventing the fictitious credit per-
75 mitted by allowing possession to remain in the debtor, it is pertinent to remark, in regard to a situation which, under the laws of the United States is, as we have said, sui generis, that, as the creditors of the distilling company had no access to the interior of the warehouse, they could not claim to have been misled to their injury. They cannot be deemed to have given credit upon the faith of whiskey in a warehouse of which they had no means of ascertaining the contents.

Of course, there is a possibility of fraud, if a dishonest distiller, with or without collusion with a government official, makes a second sale or second pledge of the same property. But, as said by the court below, this possibility has no bearing upon the question now under consideration. There is no dispute at present between two persons, both of whom are innocent purchasers or pledgees, the question being, whether any innocent purchaser or pledgee of a bonded warehouse receipt can get a good title to the whiskey without taking actual possession.

For the reasons above stated, we are of opinion that the trustees' rights to the whiskey here in question are not superior to those of the appellees, as bona fide holders for value, prior to the adjudication of bankruptcy, and the decrees of the courts below in both cases are hereby affirmed.

Endorsed: No. 1355. Opinion of the Court. Received and Filed June 19, 1911. Saunders Lewis, Jr., Clerk.

76 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. 1355. (List No. 5.)

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, Petitioner-Appellant,
vs.
PENN NATIONAL BANK OF READING, Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

W. M. LANNING,
Circuit Judge.

Philadelphia, June 21, 1911.

Endorsed: No. 1355. Order Affirming Decree. Received and Filed June 21, 1911. Saunders Lewis, Jr., Clerk.

77 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,
vs.
PENN NATIONAL BANK OF READING, Appellee.

Petition for Appeal from the Circuit Court of Appeals for the Third Circuit to the Supreme Court of the United States.

The above mentioned appellant, Joseph A. Taney, Trustee in Bankruptcy of the Miller Pure Rye Distilling Company, respectfully shows:

That the above entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit, and that a judgment has been rendered therein on the 21st day of June, A. D., 1911, affirming the decree of the District Court for the Eastern District of Pennsylvania, and that the matter in controversy in said suit exceeds the sum of Two Thousand Five Hundred Dollars, ($2,500.00) besides costs;

That this cause is one in which the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit is not made final by Section 6 of the Act of Congress of March 3rd, 1891, and that

it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

78 Wherefore, the said appellant prays that an appeal be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And he will ever pray, &c.

(Signed) JOSEPH A. TANEY,
Trustee in Bankruptcy.

(Signed) J. H. BRINTON,
Attorney for Petitioner.

Endorsed: No. 1355. Petition for Appeal to the Supreme Court of the United States. Received and Filed, July 21, 1911. Saunders Lewis, Jr., Clerk.

79 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

Order Allowing an Appeal.

And now, July 20th, A. D. 1911, it is hereby ordered that an appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

And it is further ordered that the judgment and decree of the United States Circuit Court of Appeals for the Third Circuit in said case be superseded and that execution and all further proceedings therein be stayed, pending this appeal.

(Signed) GEORGE GRAY,
Circuit Judge.

Endorsed: No. 1355. Order for Appeal to the Supreme Court of the United States. Received and Filed July 21, 1911. Saunders Lewis, Jr., Clerk.

80 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

Docket No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Respondent-Appellant,
vs.
PENN NATIONAL BANK OF READING, Petitioner-Appellee.

Assignment of Errors.

And now, July 21st, 1911, comes Joseph A. Taney, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, Respondent-Appellant, by his counsel J. H. Brinton, Esq., and respectfully represents that he feels himself to be aggrieved by the proceedings and decree of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause and assigns error thereto as follows:

First. The learned Court erred in entering the following order on June 21st, 1911, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,
vs.
PENN NATIONAL BANK OF READING, Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

81 This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same hereby is, affirmed with costs.

Phila., June 21st, 1911.

W. M. LANNING,
Circuit Judge.

Second. The learned Court erred in not finding and holding that the attempted pledge was fraudulent and void as to the creditors of the pledgor, and that the title of the appellant was superior to the title of the appellee.

Third. The learned Court erred in not reversing the judgment and decree of the court below.

Fourth. The learned Court erred in not finding and holding that the District Court for the Eastern District of Pennsylvania had no jurisdiction in this cause.

Fifth. The learned Court erred in not finding and holding that the United States Circuit Court for the Third Circuit had exclusive jurisdiction to hear and determine this cause.

(Signed) J. H. BRINTON,
Attorney for Appellant.

Endorsed: No. 1355. Assignment of Errors. Received and Filed July 24, 1911. Saunders Lewis, Jr., Clerk.

82 In the Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

Affidavit of Amount in Controversy.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Joseph A. Taney, Trustee in bankruptcy of the Estate of the Miller Pure Rye Distilling Company, being duly sworn according to law, deposes and says that on March 24, 1908, he was elected and subsequently duly qualified as Trustee of the said Bankrupt Estate; that on December 24th, 1909, the Penn National Bank of Reading filed in the District Court of the United States for the Eastern District of Pennsylvania, a petition to review the order of the referee dismissing a petition of the said Penn National Bank of Reading for an order upon your affiant as Trustee for the delivery of two hundred barrels of whiskey then in the possession of your affiant as said Trustee; that on February 12, 1910, the District Court of the United States for the Eastern District of Pennsylvania entered a decree reversing the decision of the said Referee and ordering your affiant to deliver said whiskey to the Penn National Bank of Reading; that on February 12th, 1910, your affiant
83 filed with the Circuit Court of Appeals for the Third Circuit a petition to revise in matters of law the decree the decision of the District Court for the Eastern District of Pennsylvania as aforesaid; that on June 21st, 1911, the said Circuit Court of Appeals affirmed the decision of the District Court of the United States for the Eastern District of Pennsylvania.

That the said Penn National Bank of Reading claimed title and right of possession to said whiskey under and by virtue of certain whiskey certificates, as more fully appears in the aforesaid petition. That the matters referred to above are in controversy in this suit, and the amount in controversy exceeds the sum of Two Thousand Five Hundred Dollars ($2,500.00), exclusive of interest and costs.

(Signed) JOSEPH A. TANEY.

Sworn and subscribed to before me this 19th day of July, 1911.

[SEAL.] WM. MEHARG LILLY,
Notary Public.

Endorsed: No. 1355. Affidavit as to Amount in Controversy. Received and Filed July 25, 1911. Saunders Lewis, Jr., Clerk.

84 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Joseph A. Taney, Trustee of The Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant, and Penn National Bank of Reading, Appellee, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this ninth day of August, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-fifth.

[United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 22,908. U. S. Circuit Court Appeals, 3d Circuit. Term No. 115. Joseph A. Taney, trustee of the estate of the Miller Pure Rye Distilling Company, appellant, vs. Penn National Bank of Reading. Filed October 13th, 1911. File No. 22,908.